FILED
NOV 8 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-556

PHILIP H. CALABRESE, individually and as a Councilman and Mayor of Sand City, and FRANK ZABROWSKI, individually and as Chief of Police of Sand City, California,
Petitioners,

vs.

BRADY AVERY, deceased, by and through his personal representative, and MELVIN WILLIAMS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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The petitioners, Philip Calabrese, individually and as a Councilman and Mayor of Sand City, and Frank Zabrowski, individually and as Chief of Police of Sand City, California respectfully pray that a writ of certiorari issue to review the judgment and memorandum of the United States Court of Appeals for

the Ninth Circuit entered in this proceeding on June 13, 1974, as amended by orders dated August 12, and August 26, 1974.

OPINION BELOW

The memorandum of the Court of Appeals, its order denying respondents' petition for rehearing and amending the memorandum, and its amended order denying both respondents' and petitioners' petitions for rehearing and amending the memorandum appear in Appendices B, C, and D hereto. The memorandum of decision of the District Court for the Northern District of California appears in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 13, 1974. Timely petitions for rehearing by respondents and petitioners were denied on August 12, and on August 26, 1974, respectively, and this petition for certiorari was filed within ninety days of the earlier date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in granting respondents a remitted verdict as an alternative to a new trial, when the original verdict was held by the

District Court, and by the Court of Appeals itself, to be based upon prejudice and passion, for which reason the District Court had previously granted an unconditional new trial.

STATEMENT OF THE CASE

This is a civil rights action brought pursuant to 42 U.S.C. §§1982, 1983 and 1985, by respondents Brady Avery and Melvin Williams, members of the Negro race who formerly operated an automobile repair shop in Sand City, California, against petitioners Philip Calabrese, a Councilman and Mayor, Frank Zabrowski, Chief of Police, and their co-defendants Ellis Potter, Pearl Pendergast, Mark Meadows, and Wilson Oliver, Councilmen of Sand City, for damages for the enactment and enforcement of a parking ordinance, and other acts, allegedly designed to ruin respondents' business and drive them from the city because of their race.

Following trial of the matter to a six-man jury, a verdict was rendered in favor of respondents in the sum of $32,000.00 actual damages, and $10,000.00 punitive damages, assessed against each of petitioners and their co-defendants as $5,333.33 actual damages and $1,667.67 punitive damages. Thereafter petitioners and their co-defendants requested a new trial on the grounds of misconduct of Avery as a witness, misconduct of respondents' counsel, misconduct of three trial jurors, insufficiency of the evidence to support the verdict, and error in the jury instruc-

tions. The District Court granted a new trial unconditionally as to petitioners and their co-defendants on the ground of Avery's prejudicial misconduct as a witness. With respect to Avery's misconduct the court said:

> "In a supplemental affidavit in support of defendants' motion for a new trial, defendants' counsel has listed ten answers given by plaintiff Avery which defendants contend are so prejudicial to their case that their utterance in the presence of the jury constitutes reversible error despite the Court's having ordered them stricken from the record upon defendants' counsel's objection. The answers do not lend themselves to facile characterization. Suffice it to say, however, that these challenged pronouncements of a most colorful and impassioned witness ranged from unsolicited inferences to inflammatory digressions about the character and activities of the defendants."
>
> "The Court's assessment of the atmosphere at the instant trial prompts its conclusion that the order to the jury to disregard plaintiff Avery's challenged answers was not sufficient to prevent the intrusion of extraneous matters into the jury deliberations which might have been harmful to the defendants. It was apparent to everyone from the commencement of the trial that Avery was a highly partisan and highly volatile individual. His sometimes tumultuous and inflammatory monologues were not erased by the admonition to the jury to disregard the inadvisable testimony. And accordingly, defendants' motion for a new trial on the ground of misconduct by a witness is granted." (Appendix A, "Misconduct by the witness".)

The court granted a new trial as to Potter, Pendergast, Meadows and Oliver on the additional ground of insufficiency of the evidence to support the verdict against them. It rejected the other grounds urged in support of the motion for new trial, but did state with respect to sufficiency of the evidence to support the verdict as to petitioners:

> "If a new trial did not have to be granted for Avery's misconduct, this Court would set aside the amount of the compensatory award and grant a new trial unless plaintiffs would have accepted $3,000.00 as a total award of compensatory damages. The punitive award would have been allowed to stand against Mayor Calabrese and Chief Zabrowski." (Appendix A, last paragraph.)

Avery died a month after the District Court granted petitioners a new trial.

Respondents filed a timely appeal from the order granting a new trial. The Court of Appeals held that the District Court did not abuse its discretion in granting the new trial on the ground of Avery's misconduct, and stated with respect to Avery's misconduct and juror misconduct:

> "Besides the cumulative effect of Mr. Avery's testimony as viewed by the trial court, the unauthorized and unsupervised visit by three members of the six-man jury to the scene of the plaintiffs' business concern properly required a new trial." (Appendices C, and D, last paragraph.)

However, the court went on to grant respondents a remitted verdict of $3,000.00 compensatory damages

and $3,333.34 punitive damages against petitioners, as an alternative to a new trial, because there was substantial evidence to support the verdict against them and because Avery had died and his testimony might not be fully available at a new trial. (Appendix B, second to last paragraph.)

REASON FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH A DECISION OF THE SUPREME COURT OF THE UNITED STATES, AND DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER.

The power of a District Court, or Court of Appeals, to condition its new trial order upon rejection of a remittitur is not absolute. When the verdict is the product of appeals to passion and prejudice, the trial court or appellate court must order an unconditional new trial, and cannot allow the plaintiff the option to accept a lesser verdict.

In *Minneapolis, St. Paul & Sault Sainte Marie Railway Co. v. Moquin*, 283 U.S. 520, 51 S.Ct. 501, 75 L.Ed. 1243 (1931), the Court reversed the action of the trial court in ordering a new trial on the ground of counsel's prejudicial remarks unless plaintiff agreed to a remittitur. The Court stated (283 U.S. 521, 522):

> ". . . no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously, such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A liti-

> gant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

The circuit courts have consistently adhered to this rule: *Brabham v. State of Mississippi,* 96 F.2d 210 (5th Cir. 1938); *Ford Motor Co. v. Mahone,* 205 F.2d 267 (4th Cir. 1953); *Gibbs v. United Mine Workers of America,* 343 F.2d 609 (6th Cir. 1965); *Gulf Coast v. F. R. Hoar,* 370 F.2d 746 (5th Cir. 1967); and *Dorin v. Equitable Life,* 382 F.2d 73 (7th Cir. 1967).

In the present case, the District Court found that Avery's remarks prejudiced all of the defendants, including petitioners, and that the prejudice created was sufficiently serious to warrant a new trial as to all defendants, including petitioners. Apparently, the court realized the limits this finding placed on its power to grant a remitted verdict, for it stated, in essence, that it would have granted a remitted verdict against petitioners were it not compelled to grant a new trial unconditionally for Avery's misconduct.

The Court of Appeals not only agreed with the District Court that Avery's remarks prejudiced all defendants, including petitioners, and warranted a new trial, but it found a wholly independent ground for a new trial in the misconduct of three of the trial jurors. In light of these findings of prejudicial misconduct affecting all defendants, the court could not grant respondents a remitted verdict against two of them, petitioners Calabrese and Zabrowski, without

speculating that the prejudice created by the misconduct did not affect the case against them. There is no basis for such speculation, and such speculation is prohibited by the Supreme Court's decision in *Minneapolis, St. Paul & Sault Sainte Marie Railway Co. v. Moquin, supra.*

Certainly the prejudicial effect of the misconduct created by Avery was not removed by his death.

The record clearly reveals that petitioners were denied a fair trial due to the misconduct of Avery and three of the trial jurors. The refusal of the Court of Appeals to affirm the District Court's grant of an unconditional new trial cannot be reconciled with the Supreme Court's previous decision, and the decisions of other Courts of Appeals, and cannot be justified under the circumstances of this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

BERNARD J. ALLARD,

NEAL A. CABRINHA,

Counsel for Petitioners.

November 7, 1974.

(Appendices Follow)

Appendix A

In the United States District Court
Northern District of California

No. C-51108 RFP

Grady Avery and Melvin C. Williams individually and doing business as A & W Auto Repair Shop,
Plaintiffs,

vs.

Philip H. Calabrese, Ellis D. Potter, Pearl Pendergast, Mark P. Meadows, and Wilson Oliver, individually and as Councilmen of Sand City, and Philip H. Calabrese as Mayor of Sand City, and Frank Zabrowski, individually and as a Policeman of Sand City, California, and Does I through X,
Defendants.

[Filed Oct. 16, 1972]

MEMORANDUM OF DECISION

This civil rights action was tried before a stipulated six-person jury from October 26, 1971 to November 8, 1971. The resultant verdict was for the plaintiffs, in the total amount of $32,000.00 in actual damages and $10,000.00 in punitive damages. The two amounts were divided up by the jury, however, so

they could be assessed against each of the six defendants. Thus each defendant was found liable for $5,333.33 in actual damages and $1,666.67 in punitive damages.

Defendants have timely requested a new trial on the following alternative grounds: misconduct of plaintiff Avery on the witness stand in giving highly prejudicial nonresponsive answers to certain questions asked by his own counsel; misconduct of plaintiffs' attorney Francis Heisler in appealing to the prejudice of the jury during his closing argument; misconduct of three jurors in visiting the site of plaintiffs' garage in Sand City, California, the subject of much of the controversy in the case; and that the verdict and the amount of the verdict is not supported by the evidence. In addition, on April 26, 1972, this Court issued an order pursuant to Rule 59(d), Federal Rules of Civil Procedure, requesting that the parties appear at a hearing to determine whether defendants' motion should be granted for a reason not stated therein, to wit, that this Court erred in instructing the jury that the defendant city council members (five of the six) could be held liable in damages for their acts if done in bad faith within the scope of their legislative duties. The Court noted the case of *Tenney v. Brandhove*, 341 U.S. 367 (1951), which held state legislators absolutely immune for acts done within the scope of their legitimate legislative functions.

Plaintiffs' version of the evidence will be simplified for purposes of this opinion and order. Plaintiffs

are two black men who established their own automobile repair business in Sand City, California. They claim that they were driven out of business by certain acts of the City Council, the Mayor, and the Chief of Police of that town. In Particular, the City Council enacted an ordinance prohibiting parking adjacent to plaintiffs' garage, their only purpose in doing so being to discourage customers from patronizing plaintiffs' business. In addition, the Council delayed renewal of plaintiffs' business permits beyond the time necessary for consideration of the renewal application, in order plaintiffs claim, to harass them and destroy their business. At the same time, the Mayor and Chief of Police engaged in other activities for purposes of harassing plaintiffs and discouraging them from working and living in Sand City, such as following their customers as they left the garage, and shining bright lights into plaintiff Avery's home. Defendants' motive for these activities was their dislike for persons of the Negro race.

Plaintiffs' legal theory is that the defendants—members of the Council, the Mayor, and the Chief of Police—deprived plaintiffs of their right to equal protection of the law as well as their right to engage in a lawful business by passing the ordinance and by harassing them in the above described ways, all because they were black, and all in violation of 42 U.S.C. § 1983. Furthermore, plaintiffs claim that defendants conspired together in violation of 42 U.S.C. § 1985(3) to deprive plaintiffs of these same rights.

This Court instructed the jury that defendants were liable for such violation if they did what plaintiffs claim they did, with the intentions plaintiffs claim they entertained.

Rulings Upon Grounds For Motion For a New Trial

1. *Official Immunity.* This ground was raised by the Court sua sponte, pursuant to Rule 59(d), Federal Rules of Civil Procedure.[1] The Court requested further enlightenment on the matter of the immunity accorded by law to members of the Sand City City Council for actions taken while discharging their legislative responsibilities. *Tenney v. Brandhove, supra,* provides state legislators with absolute immunity from suit for damages for legislative actions undertaken in bad faith as well as good. And the Ninth Circuit recently cited the *Tenney* holding with approval in the context of a suit against, *inter alia,* a member of the Board of Supervisors of the County of Contra Costa. *Gillibeau v. City of Richmond,* 417 F.2d 426 (9th Cir. 1969).

Plaintiffs contend, however, that although *Tenney* grants complete immunity to state legislators, its holding does not encompass a grant of similar im-

[1]The Court notes that it has the power to grant a new trial on a ground raised on its own motion, even when that ground is presented more than ten days after entry of judgment, so long as defendants have made a timely motion for a new trial on other grounds. 6A MOORE'S FEDERAL PRACTICE ¶ 59.01 (Supp. 1971). Furthermore, this Court may grant a new trial on grounds not raised by defendants during pre-trial, trial, and post-trial procedures, regardless of any implied waiver by the defendants, so long as the Court believes that to do otherwise would be to perpetrate a grave injustice.

munity to members of subordinate legislative bodies. The origin of the common law immunity imported into civil rights actions by *Tenney*, they assert, is the immunity enjoyed by members of English Parliament, the highest policy-making body in that land. It was crucial that this legislative body have complete freedom to discuss the most ponderous and controversial questions of the day. This underlying logic, plaintiffs conclude, neither dictates nor warrants granting absolute immunity to city councilmen and county commissioners.

The Ninth Circuit has not spoken directly on this question. In the *Gillebeau* case, *supra*, they were not required to deal with the issue, because regardless whether the Contra Costa County Supervisor was entitled to absolute or conditional immunity, he would not have been immune for purposes of the motion to dismiss them before the court because the complaint alleged that he had acted outside the scope of his legitimate legislative functions; and even a state legislator who acts outside the scope of his legislative duties looses the protective mantle of official immunity.

However, every court which has dealt squarely with the issue of immunity for members of subordinate legislative bodies has reached the conclusion that such individuals are entitled to a conditional privilege only, for acts done in good faith. The progenitor of most of these decisions is the concurring opinion of Judge Magruder in *Cobb v. City of Malden*, 202 F.2d 701 (1st Cir. 1953). In that case, several school

teachers sued the local city councilman for preventing the appropriation of municipal funds to pay vested contract rights. Allegedly, these councilmen had conspired to deprive the teachers of their constitutional rights by amending the city charter to provide for a referendum to reject appropriations for teachers' salaries, and by soliciting such a referendum. The majority opinion did not delve into the immunity question. But concurring in reversal of the dismissal of the complaint, Judge Magruder said, "[A]s respects members of . . . subordinate legislative bodies, there has not been such a general and unquestioned recognition at the common law of an absolute immunity from civil liability for acts done by [legislators] in their official capacity comparable to the complete immunity accorded to members of state legislators." 202 F.2d at 706. He then cited the Restatement of Torts to demonstrate that members of local legislative bodies have been held liable for libel and slander unless the defamation was in good faith. He concluded that as a "rough generalization," subordinate legislators "have a qualified privilege . . . for harms caused by acts done by them in good faith in performance of their official duty as they understood it." *Id.* at 707.

This language was quoted with approval and followed by Justice (then Judge) Stewart in *Nelson v. Knox,* 256 F.2d 312 (6th Cir. 1958), and also in *Egan v. City of Aurora,* 174 F.Supp. 794 (N.D. Ill. 1959), *Progress Development Corporation v. Mitchell,* 286 F.2d 222 (7th Cir. 1961), *Parine v. Levine,*

274 F.Supp. 269 (E.D. Mich. 1967), and *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970). And most recently, the Fifth Circuit in *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1972), indicated in a case involving county supervisors' duty to issue regulations governing the training of prison guards, that "Supervisors are in any event not liable for a good faith, reasonable choice among valid policy alternatives, even if an unwise one, and that liability for their negligence will follow only when the plaintiff can show a clear breach of duty that led to the plaintiffs' injury." 456 F.2d at 831. In an alternative holding, the Circuit found that there was no evidence that the Supervisors had acted in bad faith in failing to issue such regulations; the other alternative holding was that the Supervisors had not breached any duty owing to the plaintiff.

Accordingly, the Court believes that it did not err in instructing the jurors in the instant case that defendants could be held liable in damages for legislative actions resulting in a deprivation of plaintiffs' constitutional rights, if those actions were taken in bad faith and not for legitimate reasons related to the legislative business at hand. And the Court therefore declines to grant a new trial to the five defendant city councilmen on the ground raised by the Court sua sponte in its order of April 26, 1972.

2. *Misconduct by plaintiffs' attorney.* Defendants claim, without quoting from the record, that plaintiffs' attorney stated in his closing remarks to the jury that "he could not see how the jury could fail

to return a verdict in favor of the plaintiffs, unless the jurors were prejudiced against black people." Citing *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520 (1931), defendants conclude that since the verdict is the result, at least in part, of appeals to passion and prejudice, it must be set aside, and a new trial must be had.

Plaintiffs dispute defendants' assertion that such appeals in fact were made, also not citing from the record. It is plaintiffs' position that their attorney strove mightily to avoid injecting elements of bias or prejudice into the trial, and that the only references to race which were made in his closing argument were his reminders to the jury that they promised at voir dire that they could decide the case without considering the racial element for or against either of the parties.

Given defendants' failure to specify the precise language to which they object, and given the Court's own recollection of plaintiffs' counsel's closing argument, the Court does not find defendants' contention that a new trial must be granted because of plaintiffs' counsel's remarks particularly persuasive. Whatever references plaintiffs' counsel may have made to the element of race in the instant case were either relevant to the question whether defendants acted with an intention to deprive plaintiffs of their constitutional rights, or else were brief comments, peripheral to his main line or argument, which were not so objectionable in content or in tone to warrant the granting of defendants' motion for a new trial.

3. *Misconduct by jurors.* Affidavits from three of the six jurors establish that during the trial each one drove through the section of Sand City relevant to this case. No such visit was authorized by the Court or undertaken with the Court's supervision. The jurors made their journeys on their own initiative.

They did not, however, go as a group. One went alone, and the other two went with their respective spouses. By affidavit and when called as a witness during the hearing on defendants' motion for a new trial, each juror also swore that he did not discuss the case before, during, or after the visit with anyone else. In addition, none of the jurors emerged from his car to inspect the scene more closely; a drive past it was the only contact the jurors had.

Photographs and diagrams of the area of Sand City in which plaintiffs' former garage business was located were introduced as evidence at the instant trial. These illustrations showed that area as it appeared in 1968, when the actions complained of in this lawsuit occurred. The purpose of introducing them was, *inter alia,* to demonstrate the need for no-parking signs in the vicinity of plaintiffs' garage or the absence thereof. The Chief of Police of Sand City, Mr. Zabrowski, who is also a defendant in this case, testified at the hearing on defendants' motion for a new trial that the site of plaintiffs' former garage business and the immediately surrounding area are no longer the same as they were in 1968. However, there is no evidence or argument from defendants that any differences were such as would

prejudice defendants' position or would influence the jurors who had visited the site.

What authority the Court can uncover on the question whether such conduct warrants the granting of a motion for new trial suggests that the instant jurors did not act so improperly as to warrant the retrial of this case. In *Roberts v. United States*, 60 F.2d 871 (4th Cir. 1932), a criminal conviction for violation of the National Prohibition Act was upheld despite the fact that four of the jurors had visited and viewed the premises where the crime was alleged to have been committed, a cafe, during the course of the trial. The court there noted that "an unauthorized view or inspection by members of the jury, while improper, is not ground for a new trial unless it appears that the verdict was affected thereby . . . . There is nothing in the record before us which shows that the defendant was in any wise prejudiced by the conduct of the jurors in viewing the premises."

In *United States v. Kansas City, Mo.*, 157 F.2d 459 (8th Cir. 1946), a condemnation case, a visit to the condemned property by two or three jurors was held not to constitute grounds for a new trial, even though there was some evidence that the two or three jurors had mentioned the fact of their visits during the jury deliberations. The court found that the visits were not prejudicial, because

> Had either of the parties requested that the jurors be permitted to view the premises, the request would doubtless have been granted as this is common practice in condemnation pro-

> ceedings. The testimony described the property, the nature and extent of the improvements, the character and extent of the easements, and the structures placed upon it, in great detail, and there were also before the jury numerous photographs showing scenes before development of the park and after completion thereof, and photographs showing the transmission line as constructed, and other photographs showing scenes in the park. There was presumably nothing about the physical facts in connection with this property that the jury should not have known, and it is scarcely conceivable that an inspection of the premises could have resulted in any prejudice to the government.

Similarly, in *Kilgore v. Greyhound Corporation,* 30 F.R.D. 385 (E.D. Tenn. 1962), a personal injury suit arising from the collision of a Greyhound bus and plaintiff's automobile, a new trial was not granted despite the fact that one of the jurors had visited the scene of the collision and had recounted his experience when the jurors had reassembled. The court stated that,

> From all the foregoing the Court is of the opinion that the ill-advised extracurricular actions and resulting comments of the juror Deal does not give rise to the presumption that the jury was improperly influenced thereby. Deal's comments could not have added to or changed the facts the entire jury heard from the witness stand. His fellow jurors would have been naive indeed to have accepted as "expert testimony" Deal's conclusions from his experience outside of court.

The only case this Court is aware of in which a trial judge granted a new trial on the basis of a juror's independent inspection is distinguishable from the instant case. In *Aluminum Company of America (Alcoa) v. Loveday,* 273 F.2d 499 (6th Cir. 1959), a cattle owner sued Alcoa, claiming that gases exuded by Alcoa's plant had injured his stock. Apparently one juror visited the critical area during the trial, viewed the cattle, and returned to the jury room to report to his fellow jurors that "the cattle were about the best looking he had seen in a long time." On the basis of this information, the trial judge found that the conduct of the juror had prejudiced the claimes of the plaintiffs in the minds of some of the jurors. However, in the instant case, unlike the *Alcoa* case, there is no evidence that the jurors discovered anything potentially prejudicial to the defendants, nor is there evidence that they communicated their findings to the other jurors during deliberations.

The affidavits and live testimony of the jurors who visited Sand City suggest to this Court that the three jurors in question visited the site of plaintiffs' former business to satisfy their curiosity rather than to garner information for use in the jury's deliberations. And while the taking of unauthorized visits cannot be condoned, it nevertheless is true that the jurors made an admirable attempt, both during and after their sojourns to comply with the Court's admonition not to discuss the case with anyone except their fellow jurors (and only then when all parties

have rested), as well as the Court's admonition to decide the case only on the basis of the evidence placed before the jury during the trial. Finally, the Court notes that here, as in *United States v. Kansas City, Mo., supra,* there were maps and photographs of the site available to the jurors before any of the visits was undertaken; and thus no new or special information was made available to the jurors who took the trip which might have been prejudicial to the defendants.

Accordingly, this Court declines to grant defendants' motion for a new trial on the ground of jury misconduct.

4. *Misconduct by the witness.* In a supplemental affidavit in support of defendants' motion for a new trial, defendants' counsel has listed ten answers given by plaintiff Avery which defendants contend are so prejudicial to their case that their utterance in the presence of the jury constitutes reversible error despite the Court's having ordered them stricken from the record upon defendants' counsel's objection. The answers do not lend themselves to facile characterization. Suffice it to say, however, that these challenged pronouncements of a most colorful and impassioned witness ranged from unsolicited inferences to inflammatory digressions about the character and activities of the defendants.

In most cases, error is prevented at trial if the judge orders non-responsive answers stricken from the record. Such answers can provide grounds for a

new trial only under special circumstances, where "the prejudicial and harmful effect of the volunteered remark could not possibly be eradicated from the jury's thinking while deliberating upon the case." Whether such circumstances exist, one court has suggested, depends for the most part on "the atmosphere of the trial." *Beck v. Wings Field, Inc.*, 122 F.2d 114 (3d Cir. 1941). In that case, a pilot who had been called as an expert witness in an airplane crash case involving a defective runway testified unsolicitedly that he too had "cracked up"; in "that ditch". The court summed up the case for finding reversible error as follows:

> The remark in this case was not only improper as introducing collateral matter of like general nature which had no proper place in the case but, more than that, it was positively harmful. It brought to the minds of the jury from a witness, who admitted to large experience in flying and knowledge of aeroplanes, that even he, expert as he was, had had an accident at the same "ditch." To refer to his unrelated "crash" was bad enough but even the "ditch" according to another of the plaintiff's witnesses, was "really not a ditch, * * * [but] just a depression" which was smooth "if you mean there are no abrupt bumps or holes or things like that." Furthermore, after the court had refused the defendant's motion to withdraw a juror, counsel for the plaintiff asked no further questions of Bullard, although the witness had not yet been interrogated for the purpose for which he had been offered. There was not only the harm from what the witness did say but also possible harm from the jury's speculating as

to what he apparently had not been permitted to say.

122 F.2d at 117.

The Court's assessment of the atmosphere at the instant trial prompts its conclusion that the order to the jury to disregard plaintiff Avery's challenged answers was not sufficient to prevent the intrusion of extraneous matters into the jury deliberations which might have been harmful to the defendants. It was apparent to everyone from the commencement of the trial that Avery was a highly partisan and highly volatile individual. His sometimes tumultuous and inflammatory monologues were not erased by the admonition to the jury to disregard the inadvisable testimony. And, accordingly, defendants' motion for a new trial on the ground of misconduct by a witness is granted.

5. *Insufficiency of the evidence to support the verdict.* Pursuant to Rule 59(a), Federal Rules of Civil Procedure, this Court may grant a new trial if the jury's verdict is so clearly against the weight of the evidence that it is apparent the jury reached its verdict out of improper motives or in an erroneous manner.

The Court is deeply troubled by the nature of the evidence introduced to show the bad faith or conspiracy of four of the five defendant city council members, demonstration of such bad faith or conspiracy being necessary to entitle plaintiffs to recovery in damages. There is no doubt in the Court's mind that with respect to at least one defendant city coun-

cil member—Mayor Calabrese, who sat on the Council in addition to serving as mayor—sufficient evidence of bad faith was introduced. However, with respect to the other four defendant city council members, no similar evidence was forthcoming from the plaintiffs.

The primary action of the Sand City City Council upon which plaintiffs base their claim against these four defendants is its enactment of the no-parking ordinance for the area around plaintiffs' business. Plaintiffs asked the jury to infer that this ordinance was enacted either in bad faith or pursuant to a conspiracy to deprive plaintiffs of their constitutional rights from the total absence of legitimate reasons for enacting it. Yet, there is no evidence that defendant Potter even attended the council meeting during which the ordinance in question was passed, let alone that he voted for it out of improper motives. As to the remaining three defendant council members—Ms. Pendergast, Mr. Meadows, and Mr. Oliver—there is little or no evidence to prove that they voted for the ordinance with the requisite bad faith or pursuant to the requisite conspiracy. Rather, the evidence shows that although there may indeed have been no legitimate reason for enacting the ordinance, these three city council members were under the impression at the time they voted for it that such reasons existed. Their impression may well have been based on misleading information from the Mayor about the necessity to control traffic in the vicinity of plaintiffs' garage; but this very real possibility supports only the inference that the Mayor acted in very

bad faith, not the inference that the three council members acted in bad faith. And this Court is not prepared to impose on each city council member a duty to investigate independently all the information placed before him or her by his or her fellow members. Finally, apart from debate at the city council meeting in question, there is no appreciable evidence of bad faith or conspiracy on the part of the four defendant city council members aside from Mayor Calabrese.

This Court concludes, then, that the clear weight of the evidence does not support plaintiffs' allegation that defendants Potter, Pendergast, Meadows, and Oliver either acted in bad faith in depriving plaintiffs of their constitutional rights, or conspired to effect such a deprivation. Accordingly, the motions of these defendants for a new trial is hereby GRANTED on this additional ground. Since the evidence was sufficient to support plaintiffs' allegations that defendants Calabrese and Zabrowski harassed them with the requisite intent or pursuant to the requisite conspiracy, the motions of these defendants for a new trial is hereby DENIED on this ground.

The evidence is not sufficient to support an award of damages as found by the jury. It is suspicious that plaintiffs were unable to locate the accounting books for their business years in which damages were claimed. The testimony of plaintiffs as to their damages strained the credulity of this Court. If a new trial did not have to be granted for Avery's misconduct, this Court would set aside the amount of the

compensatory award and grant a new trial unless plaintiffs would have accepted $3,000.00 as a total award of compensatory damages. The punitive award would have been allowed to stand against Mayor Calabrese and Chief Zabrowski.

Dated: Oct. 13, 1972.

/s/ Robert F. Peckham
United States District Judge

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 73-1401

Brady Avery, now deceased, by and through his personal representative, and Melvin C. Williams, etc.,
Plaintiffs-Appellants,

vs.

Philip H. Calabrese, et al.,
Defendants-Appellees.

[Filed Jun 13, 1974]

On Appeal from the United States District Court for the Northern District of California

Before: WRIGHT and CHOY, Circuit Judges, and PALMIERI,* District Judge.

MEMORANDUM

Plaintiffs-appellants, owners and operators of A & W Auto Repair Shop, brought this civil rights action for damages and injunctive relief against the defendants-appellees, the Mayor, Chief of Police and

*United States District Judge for the Southern District of New York, sitting by designation.

members of the Town Council of Sand City, California, in their individual and official capacities. The complaint alleged, *inter alia,* that the defendants had conspired to harass the plaintiffs by passing a city ordinance which prohibited parking in front of the repair shop in order to drive them out of business and out of the city because of their race. 28 U.S.C. § 1343. After trial to a jury, the plaintiffs were awarded damages against all six of the defendants, $32,000.00 as compensatory damages, and $10,000.00 as punitive damages.

The verdict was filed on November 8, 1971 and judgment on the verdict was entered on November 11, 1971. The defendants mailed their "Notice of Motion and Motion for New Trial" on November 19, 1971, which was filed with the district court on November 22, 1971, asserting as grounds therefor (a) misconduct of parties, counsel and jurors, (b) that the verdict was against the weight of the evidence and (c) that the amount of the verdict was unsupported by the evidence. We reject the appellants' contention that the motion for new trial was untimely. Fed.R.Civ.P. 59(b), 5(b), 5(d); *see McConnell v. United States,* 50 F.R.D. 501 (E.D.Tenn. 1970).

On April 26, 1972, the trial court ordered that "the submission of defendants' timely motion for a new trial on December 13, 1971, is hereby vacated." By the same order, the court ordered the parties to appear for a hearing on May 22, 1972, for the purpose of considering, under Fed.R.Civ.P. 59(d), whether a new trial should be granted because of the defendants'

official immunity. Following hearing and submission of memoranda, the court on October 16, 1972, granted the defendants' motion for new trial on the ground that plaintiff Avery's conduct on the witness stand might have been prejudicial to the defendants. Additionally, the district court held that the evidence was insufficient to support the verdict against the defendant councilmen, but that it was sufficient as against the Mayor and Chief of Police, and that the evidence was insufficient to support the jury's award of damages, except as concerned the punitive damages against the Mayor and Chief of Police. The court, properly we think, *Scheuer v. Rhodes*, ... U.S. ....., 42 U.S.L.W. 4543 (U.S. decided April 17, 1974); *Doe v. McMillan*, 412 U.S. 306, 318-20 (1973); *see also Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973); denied the motion for new trial on the grounds of absolute official immunity. Its instructions were in accordance with the law as established in those decisions.

Appellants would have this court engraft the California state time period for ruling on a motion for new trial onto Fed.R.Civ.P. 59, by analogy to the use of state statutes of limitation in cases arising under 42 U.S.C. § 1983. The Rule, however, is a federal one, subject to federal application. *See, e.g., Holmes v. Wack*, 464 F.2d 86, 88 (10th Cir. 1972). The test is whether, considering all of the circumstances, the district court abused its discretion in taking the amount of time it did in deciding the issue. Applying this test, we cannot say that the time taken here was unreasonably prolonged in view of the difficulty of the issues.

Without delving into the question of whether or not the district court either had the power or abused its discretion in ordering a new trial on the grounds of insufficiency of the evidence as to verdict and the award of damages absent a motion for directed verdict, *cf. Oslund v. State Farm Ins. Co.*, 242 F.2d 813, 815 (9th Cir. 1957); *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 816-17 (2d Cir. 1970); *United States v. Bucon Const. Co.*, 430 F.2d 420, 423-24 (5th Cir. 1970); *contra, Southern Ry. Co. v. Miller*, 285 F.2d 202, 206 (6th Cir. 1960); *Pruett v. Marshall*, 283 F.2d 436, 438 (5th Cir. 1960); *Williams v. Watson*, 346 F.Supp. 1377, 1378 (E.D.Tenn. 1972), we think that the court had the power to grant and did not abuse its discretion in granting the motion on the ground of Avery's misconduct. The experienced trial court, having listened to the testimony and carefully determined its import and effect on the jury, was in the best position to decide whether a new trial should be had on this ground. On numerous occasions the plaintiff proved to be an unmanageable witness. He was described by the trial judge as "a highly partisan and highly volatile individual." Additionally, the trial judge felt that his "tumultuous and inflammatory monologues" could not be cured by the jury admonitions and other efforts to preserve the integrity of the trial. From a careful and thorough review of the record we can find no abuse of discretion. *Simpson v. Union Oil Co. of California*, 411 F.2d 897, 907-908 (9th Cir. 1972).

It is axiomatic that a party cannot appeal from a judgment or order in his favor; equally aphoristic

is the proposition that an appeal brings with it all of those component elements inherent and necessary for review. We think that the cumulative effect of Mr. Avery's testimony, as viewed by the trial court, coupled with the unauthorized and unsupervised visit by three members of the six-man jury to the scene of the plaintiffs' business concern, properly required a new trial.

In determining whether or not to grant a new trial the lower court was of the opinion, with which we agree, that there was substantial evidence to support the verdict and award of punitive damages against the Mayor and Chief of Police, and that this was separable from the action against the members of the City Council. In view of this fact and the further circumstances that Mr. Avery is now deceased and his testimony may not be fully available at any new trial, we believe that the better course is to allow the plaintiffs the opportunity, on remand, to agree upon a remittitur as an alternative to a new trial. Should the plaintiffs be willing to accept, as total compensatory damages, the amount of $3,000.00 that the trial court thought would be justified under the evidence and, in addition, the award of punitive damages from the Mayor and Chief of Police in the amount of $3,333.34, then judgment should be so entered, with costs. If not, then a new trial will be had.

Accordingly, the order of the district court granting a new trial is AFFIRMED in part, VACATED in part and REMANDED to that court for further proceedings in accordance herewith.

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 73-1401

Brady Avery, now deceased, by and through his personal representative, and Melvin C. Williams, etc.,
Plaintiffs-Appellants,

vs.

Philip H. Calabrese, et al.,
Defendants-Appellees.

ORDER

Before: WRIGHT and CHOY, Circuit Judges, and PALMIERI,* District Judge.

The panel as constituted in this above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

*The Honorable Edmund L. Palmieri, Sr. United States District Judge for the Southern District of New York, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The Memorandum of this court on this matter (slip-sheet dated June 13, 1974) shall be amended so that the last sentence on page three reads as follows:

> Besides the cumulative effect of Mr. Avery's testimony as viewed by the trial court, the unauthorized and unsupervised visit by three members of the six-man jury to the scene of the plaintiffs' business concern properly required a new trial.

Appendix D

United States Court of Appeals
For the Ninth Circuit

No. 73-1401

Brady Avery, now deceased, by and through his personal representative, and Melvin C. Williams, etc.,
Plaintiffs-Appellants,

vs.

Philip H. Calabrese, et al.,
Defendants-Appellees.

[Filed Aug. 28, 1974]

AMENDED ORDER

Before: WRIGHT and CHOY, Circuit Judges, and PALMIERI,* District Judge.

The panel as constituted in the above case has voted to deny both partitions for rehearing and to reject the suggestion of appellants for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

*The Honorable Edmund L. Palmieri, Sr. United States District Judge for the Southern District of New York, sitting by designation.

The petitions for rehearing are denied and the suggestion for rehearing en banc is rejected.

The Memorandum of this court on this matter (slip-sheet dated June 13, 1974) shall be amended so that the last sentence on page three reads as follows:

> Besides the cumulative effect of Mr. Avery's testimony as viewed by the trial court, the unauthorized and unsupervised visit by three members of the six-man jury to the scene of the plaintiffs' business concern properly required a new trial.

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IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1974

No. A-401

PHILIP A. CALABRESE, individually and as a Councilman and Mayor of Sand City, and FRANK ZABROWSKI, individually and as Chief of Police of Sand City, California,

Petitioners,

vs.

PRESALEAN AVERY, personal representative of BRADY AVERY, deceased, and MELVIN WILLIAMS,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Memorandum of Decision of the District Court was dated October 13, 1972 and filed on October 15, 1972 (Pet. App. I-XVIII). The Opinion of the Court of Appeals is unreported (Pet. App. XIX-XXIII). Its order denying the*

**Refers to Appendix attached to Petition for a Writ of Certiorari.*

Petition for Rehearing and rejecting the suggestion for rehearing en banc is similarly unreported (Pet. App. XXIV-XXV). A further unreported clarifying order appears as (Pet. App. XXVI-XXVII).

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1974. The two additional orders were entered on August 12 and August 26, 1974. Petition for Certiorari was dated November 7, 1974 invoking the jurisdiction of this Court under 28 USCA § 1254 (1). By order of Mr. Justice Douglas the time of filing a Cross-Petition for a Writ of Certiorari was extended to and including January 8, 1975. This Opposition is timely filed.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in granting a conditional new trial alternative to a substantial remittitur.

2. Whether the Court of Appeals was correct in granting a new trial conditional on a remittitur in consideration of the circumstances that "Mr. Avery is now deceased and his testimony may not be fully available at any new trial."

STATEMENT

For the purpose of this Brief in Opposition the restitution as contained in the Memorandum of the Court of Appeals is adopted. There it is stated:

> *"Plaintiffs-appellants, owners and operators of A & W Auto Repair Shop, brought this civil rights action for damages and injunctive relief against the defendants-appellees, the Mayor, Chief of Police and members of the Town Council of Sand City, California, in their individual and official capacities. The complaint alleged, inter alia, that the defendants had conspired to harass the plaintiffs by passing a city ordinance which prohibited parking in front of the repair shop in order to drive them out of business and out of the city because of their race. 28 U.S.C. § 1343. After trial to a jury, the plaintiffs were awarded damages against all six of the defendants, $32,000.00 as compensatory damages, and $10,000.00 as punitive damages.*
>
> *"The verdict was filed on November 8, 1971 and judgment on the verdict was entered on November 11, 1971. The defendants mailed their 'Notice of Motion and Motion for New Trial' on November 19, 1971, which was*

filed with the district court on November 22, 1971, asserting as grounds therefor (a) misconduct of parties, counsel and jurors, (b) that the verdict was against the weight of the evidence and (c) that the amount of the verdict was unsupported by the evidence.

"On April 26, 1972, the trial court ordered that 'the submission of defendants' timely motion for a new trial on December 13, 1971, is hereby vacated.' By the same order, the court ordered the parties to appear for a hearing on May 22, 1972, for the purpose of considering, under Fed. R. Civ. P. 59 (d), whether a new trial should be granted because of the defendants' official immunity. Following hearing and submission of memoranda, the court on October 16, 1972, granted the defendants' motion for new trial on the ground that plaintiff Avery's conduct on the witness stand might have been prejudicial to the defendants. Additionally, the district court held that the evidence was insufficient to support the verdict against the defendant councilmen, but that it was sufficient as against the Mayor and Chief of Police, and that the evidence was insufficient to support the jury's award of damages, except as concerned the punitive damages against the

Mayor and Chief of Police. The court, properly we think, Scheuer v. Rhodes, _____U.S. _____, 42 U.S.L.W. 4543 (US decided April 17, 1974); Doe v. McMillan, 412 U.S. 306, 318-20 (1973); see also Smith v. Losee, 485 F.2d 334 (10th Cir. 1973); denied the motion for new trial on the grounds of absolute official immunity. Its instructions were in accordance with the law as established in those decisions."

ARGUMENT

The decision of the Court of Appeals as to the conditional granting of a new trial, conditioned on a remittitur is proper. There is no conflict in the decisions nor is there other ground for further review by this Court.

The decision in Minneapolis, St. Paul and Sault Sainte Marie Railway Company v. Moquin, 283 US 520 51 S.Ct. 501, 75 L.Ed. 1243 (May 18, 1931) was cited by Petitioners only in part. They failed to include in the quotation (page 6) the words:

"In actions under the Federal statute."

The statute referred to was the Federal Employee's Liability Act, and the holding, as we read it, applies to cases brought under that Act. So it will appear since this Court in the case of Limick v. Schiedt, 293, US 474, ___S.Ct.___

(January 7, 1935) held to the contrary then Petitioners read the Minneapolis case, supra. In Dimick, supra, Mr. Justice Sutherland speaking for the majority of the Court stated that:

> *"It is worthy of note that while for more than a century the federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages, no federal court, so far as we can discover, has ever undertaken to increase damages..."*

It is further worthy of note that Mr. Justice Stone dissenting (Joined by the Chief Justice and Mr. Justice Brandeis and Mr. Justice Cardozo) did not dissent from the approval of the remittitur and thus decrease damages. They only dissented because they held that damages may be increased and thus avoid a costly new trial.

Petitioners are in error when they state (page 7):

> *"The circuit courts have consistently adhered to this rule".*

i.e., their interpretation of the Minneapolis holding. To the contrary the circuits were willing to examine the holdings of the trial court as to "passion and prejudice".

In Dorin v. Equitable Life, 382 F.2d 73 (7th Cir.) the Court of Appeals upheld the remittitur in lieu of a new trial stating:

> *"We do not regard the judge's use of the term 'passion and prejudice' as carrying the broad meaning which Equitable would attribute to it."*

In Gulf Coast v. F.R. Hoar, 370 F.2d 746 (5th Ct) the Court of Appeals disagreed with appellant's contention that because a remittitur was ordered by the trial court that therefore there was prejudice.

In Gibbs v. United Mine Workers of America, 343 F.2d 609 (6th Ct.) the Court of Appeals upheld the remittitur by holding that:

> *"This finding (of the trial court) distinguishes this case from the cases cited above where the trial judge had found the order to be the product of passion, and moves it into the traditional area where a remittitur may be employed to avoid an excessive verdict without resort to a new trial."*

In Ford Motor Co. v. Mahone, 205 F.2d 267 (4th Ct.) the Court of Appeals reversed the refusal to grant a new trial, because it found that the verdict of the jury was not above suspicion, as it ought to be.

Brabham v. State of Mississippi, 96 F.2d 210 (5th Ct.) was a suit against the Sheriff and his deputies for assault upon a minor. Damages in the amount of $15,000.00 were awarded by the jury. The amount was to be grossly excessive and the trial court ordered a conditional new trial unless the plaintiffs remits $10,000.00 which he did.

The Court of Appeals disapproval of the remittitur by holding:

> *"...while mere excessiveness in the amount to be awarded may be cured by a remittitur, that excessiveness which results from passion and prejudice, however natural the resentment which arouses it, may not be so cured."*

The Court of Appeals found the verdict to be the result of passion and prejudice, holding:

> *"The District Judge felt as the jury did, and as we do, the outrageousness of Vennado's conduct of, as the jury evidently believed, the circumstances of the arrest were as plaintiff's evidence declared them to be. He regretted, as we do, that the jury in considering the damages appropriate to be awarded was carried away by that sense of that outrage. He thought a remittitur would restore to the verdict the cool justice that it lacked."*

In the Brabham case, supra, "cool justice" prevailed and thus the plaintiff who was "so outrageously wronged" may try again. "Cool justice" (whatever that may be) also prevails as to the defendants who acted so outrageously but go scot free, unless the plaintiff musters the courage to seek "cool justice" again.

If the holding in Brabham, supra, stands for the proposition as it appears, a defendant is always entitled to a new trial, because if he acted "outrageously" then the verdict is the result of prejudice. On the other hand, if he did not act too outrageously and the jury returned a verdict for the plaintiff, such verdict must be, in nature of the things expressed by Brabham, - the result of prejudice.

Respondents submit that the Mimeapolis case, supra, cannot be read as giving birth to such a progeny.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: December 31, 1974.

Respectfully submitted,

FRANCIS HEISLER
Counsel for Respondents